

United States  
Circuit Court of Appeals <sup>7</sup>  
For the Ninth Circuit.

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J. W. MAXWELL,

Plaintiff in Error,

vs.

EVA L. RICKS,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the Western District of Washington,  
Northern Division.

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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J. W. MAXWELL,

Plaintiff in Error,

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Defendant in Error.

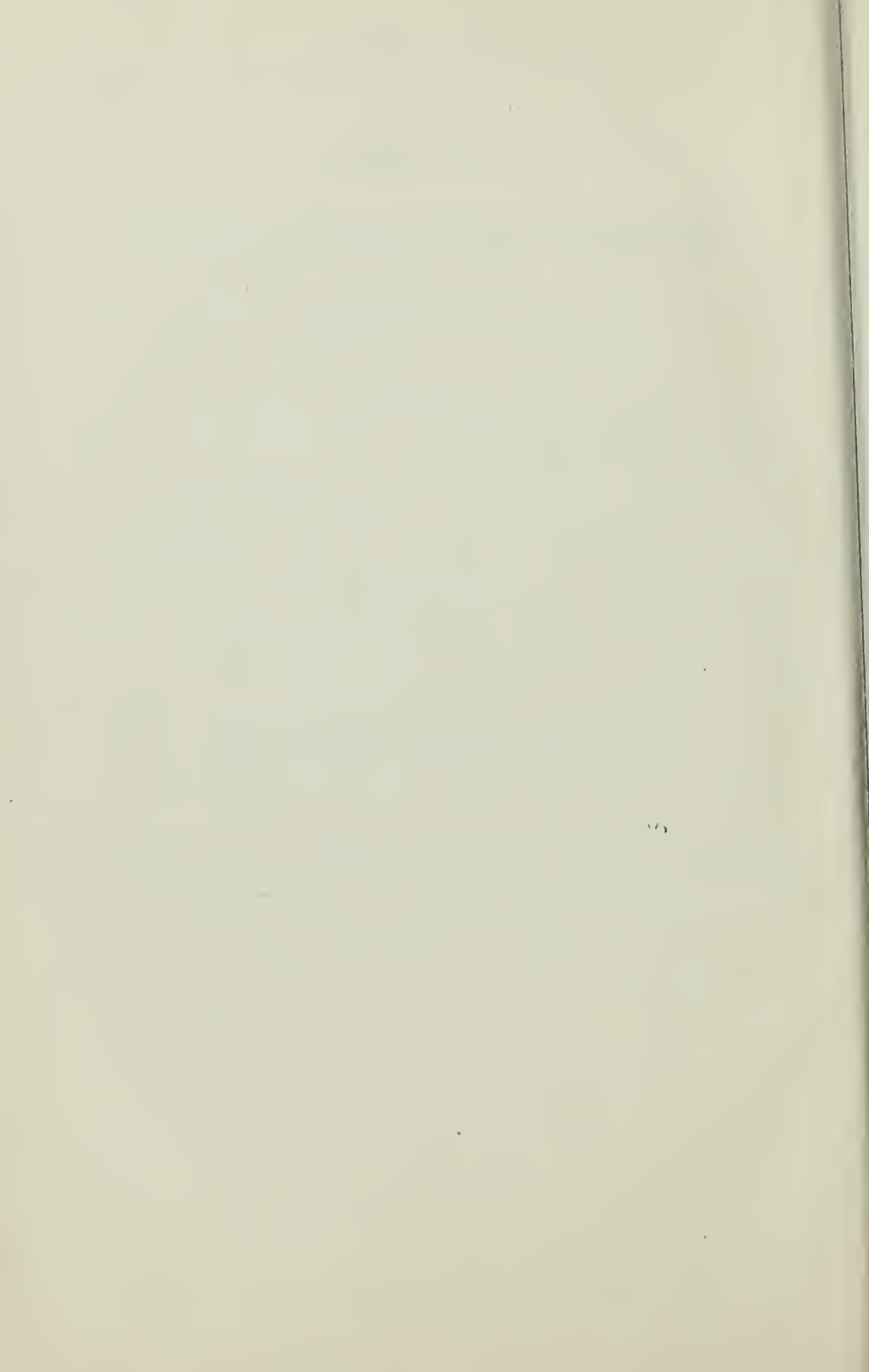
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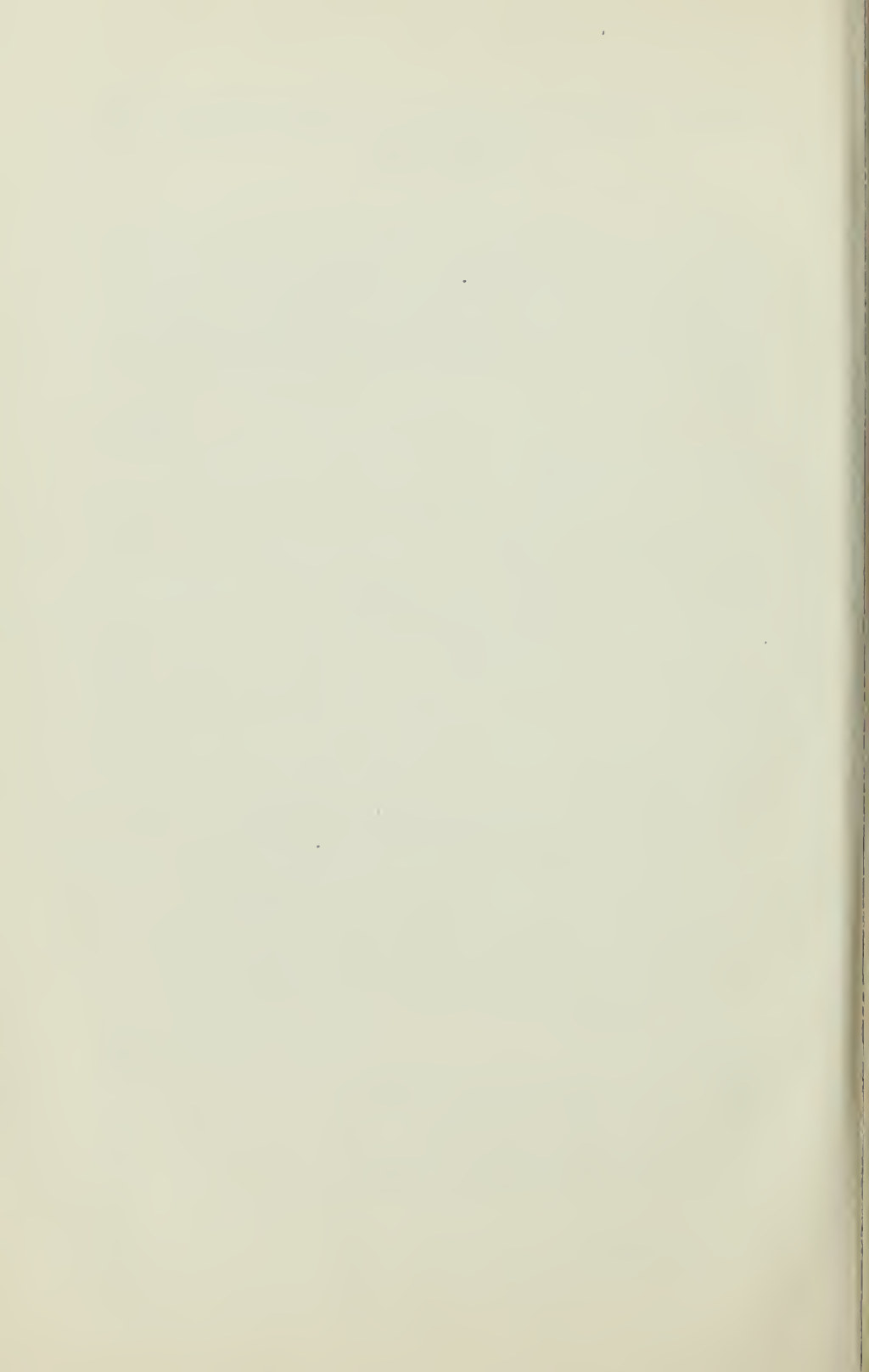
[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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### **Names and Addresses of Counsel.**

CARROLL B. GRAVES, Esq., Attorney for Plaintiff in Error, 607 Central Building, Seattle, Washington.

C. A. RIDDLE, Esq., Attorney for Defendant in Error, 327 Colman Building, Seattle, Washington. [1\*]

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In the District Court of the United States in and for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

G. W. NINEMIRE,

Garnishee Defendant.

### **Amended Complaint.**

Plaintiff complains of defendant as follows:

#### **I.**

That on to wit: November the 19th, the said defendant Eva L. Ricks, for valuable consideration, executed and delivered at San Francisco, California, to one J. R. Moore, then and now a resident citizen of the State of Washington, of Seattle, Washing-

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\*Page-number appearing at foot of page of original certified Transcript of Record.

ton, her two promissory notes in the amount of Five Thousand (\$5,000) Dollars each, with interest payable at the rate of 7 per cent per annum, in terms and figures set out in Exhibits "A" and "B" hereto attached and made part hereof.

## II.

That for valuable consideration said J. R. Moore, prior to the maturity of said notes, sold and delivered, endorsing the same in due course to plaintiff herein; then and now a resident citizen of the State of Washington, and that though repeatedly requested said defendant Eva L. Ricks has not paid said principal or interest or any part thereof, and refuses to pay same or any part thereof, and plaintiff has at all times had possession of said notes. [2]

## III.

That in order particularly to secure said obligations said defendant tendered and transferred to said J. R. Moore certain security in the nature of a mortgage, true copy of which is attached hereto and made part hereof as Exhibit "C," and which said defendant pretended had a value sufficient to properly secure said obligations, but in truth and in fact the said property represented by said mortgage has no market value, and that the said instrument describing said security will be tendered in court and retransferred to said defendant Eva L. Ricks, and the plaintiff offers hereby to execute any instrument requisite and proper to accomplish said offer at any time on defendant's demand.



## IV.

That defendant agreed to pay a reasonable amount as and by way of attorney's fees, and that a reasonable attorney's fee in the premises is Five Hundred (\$500) Dollars.

WHEREFORE plaintiff prays judgment against defendant in the amount of Ten Thousand (\$10,000) Dollars, with interest from November 19, 1920, and for attorneys' fees in the amount of Five Hundred (\$500) Dollars, and for costs herein legitimately to be taxed.

FLICK & PAUL,  
Attorneys for Plaintiff. [3]

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**Exhibit "A."**

\$5,000.00

San Francisco, Calif., November 19, 1920.

On or before eight (8) months after date, without grace, I promise to pay to J. R. Moore, or order, the sum of Five Thousand Dollars (\$5,000), with interest thereon after date at the rate of seven per cent (7%) per annum, both principal and interest payable only in lawful money of the United States.

This note is secured by a mortgage of even date herewith.

EVA L. RICKS. [4]

**Exhibit "B."**

\$5,000.00.

San Francisco, Calif., November 19, 1920.

On or before four (4) months after date, without grace, I promise to pay to J. R. Moore, or order, the sum of Five Thousand Dollars (\$5,000), with interest thereon after date at the rate of seven per cent (7%) per annum, both principal and interest payable only in lawful money of the United States.

This note is secured by a mortgage, of even date herewith.

EVA L. RICKS. [5]

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**Exhibit "C."**

THIS INDENTURE, made the nineteenth day of November, one thousand nine hundred and twenty, between Eva L. Ricks (a widow), of the County of Humboldt, State of California, the party of the first part, and J. R. Moore, of the City of Seattle, State of Washington, the party of the second part, WITNESSETH:

That the party of the first part, for and in consideration of the sum of Ten (\$10) Dollars lawful money of the United States of America, to her in hand paid, the receipt whereof is hereby acknowledged, does by these presents, grant unto the party of the second part, his heirs and assigns forever, all that certain real property situate, lying and being in the County of Del Norte, State of California,

bounded and particularly described as follows, to wit:

The West half of the Northwest quarter of Section 8; the Southwest quarter of the Southwest quarter of Section 5; and the Southeast quarter of the Southeast quarter of Section 6, in Township 13 North of Range 2 East of Humboldt Meridian, containing 160 acres according to the official Plat of the survey of said land by the United States; together with the timber growing thereon.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof.

TO HAVE AND TO HOLD the said premises, together with the appurtenances, unto the party of the second part, his heirs and assigns forever.

THIS CONVEYANCE is intended as a mortgage to secure the payment of those two certain promissory notes in the words and figures following, to wit:

\$5,000.00.

San Francisco, Calif., November 19, 1920.

On or before four (4) months after date, without grace, I promise to pay to J. R. Moore, or order, the sum of Five Thousand Dollars (\$5,000.00), with interest thereon after date at the rate of seven per cent (7%) per annum, both principal [6] and interest payable only in lawful money of the United States.

This note is secured by a mortgage of even date herewith.

EVA L. RICKS.

\$5,000.00.

San Francisco, Calif., November 19, 1920.  
(Rev. Stamp \$1.00 Cancelled.)

On or before eight (8) months after date, without grace, I promise to pay to J. R. Moore, or order, the sum of Five Thousand Dollars (\$5,000), with interest thereon after date at the rate of seven per cent (7%) per annum, both principal and interest payable only in lawful money of the United States.

This note is secured by a mortgage of even date herewith.

EVA L. RICKS.

and these presents shall be void if such payments be made according to the tenor and effect thereof; but in case default be made in the payment of said principal or any of the interest, upon said promissory notes, as herein provided, then the party of the second part, his executors, administrators and assigns, are empowered to sell said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, to retain the said principal and interest, together with the costs and charges making such sale, and a reasonable amount for attorney's fees which said costs and charges and attorney's fees shall be a charge upon said premises and may be deducted from the proceeds of the sale above authorized; and the overplus, if any there be, shall be paid by the party

making such sale, on demand, to the party of the first part, her heirs or assigns.

This mortgage is also intended to secure, and does hereby secure, the payment of all liens and incumbrances upon said property, and the charges and counsel fee herein mentioned, said counsel fee to become payable and be allowed if suit be commenced to foreclose this mortgage.

In the event the amount due upon said promissory note hereinabove firstly set forth, both principal and interest, is not paid when due, at the option of the holder of said promissory note and this mortgage the amount, both principal and interest, of the promissory note secondly hereinabove set forthwith shall become due and payable.

In the event that the principals of both of said notes are paid within ninety (9) days from date hereof, not interest whatever shall be charged or shall become due or payable upon either of said promissory notes.

IN WITNESS WHEREOF, the party of the first part has hereunto set her hand the day and year first above written.

EVA L. RICKS.

Signed and delivered in the presence of

THEO. F. ROCHE. [7]

State of California,

City and County of San Francisco,—ss.

On this 19th day of November in the year one thousand nine hundred and twenty before me Lloyd Macomber, a notary public, in and for the city and county of San Francisco, personally appeared



Eva L. Ricks (widow) known to me to be the person whose name is subscribed to the within instrument, and she duly acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco in the day and year in this certificate first above written.

[Seal] LLOYD MACOMBER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

State of Washington,  
County of King,—ss.

J. W. Maxwell, being first duly sworn on oath says: That he is the plaintiff in the above-entitled action; that he has read the foregoing, knows the contents thereof and believes the same to be true.

J. W. MAXWELL.

Subscribed and sworn to before me this 29th day of May, 1922.

[Notary Seal] HENRY FLICK.  
Notary Public in and for the State of Washington,  
Residing at Seattle, Wash.

Copy of within amended comp. received and due service of the same acknowledged this 31st day of May, 1922.

C. A. RIDDLE,  
Attorney for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Jun. 13, 1922. F. M. Harshberger,  
Clerk. By S. E. Leitch, Deputy. [8]

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In the District Court of the United States in and  
for the Western District of Washington, North-  
ern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff.

vs.

EVA L. RICKS,

Defendant.

G. W. NINEMIRE,

Garnishee Defendant.

**Answer to Amended Complaint.**

Comes now the above-named defendant, and for  
answer to the amended complaint of the plaintiff  
herein, denies and alleges as follows:

**I.**

That defendant admits that on or about the 19th  
day of November, 1920, she executed and delivered  
to one J. R. Moore, at San Francisco, California,  
two promissory notes in the sum of Five Thousand  
(\$5000.00) Dollars each, with interest thereon at the  
rate of seven (7) per cent per annum, in terms and  
figures as set out in Exhibits "A" and "B" attached  
to said amended complaint, as alleged in paragraph  
I of said amended complaint, but defendant denies  
that said notes were given for a valuable considera-  
tion, or for any consideration, and denies each and

every of the other allegations being and contained in said paragraph I.

## II.

That defendant admits that she has not paid said notes, or either of them, principal or interest, as alleged in paragraph II [9] in said amended complaint; and she denies each and every of the other allegations in said paragraph II.

## III.

That defendant admits that in order to secure said promissory notes she executed and delivered to said J. R. Moore security in the nature of a mortgage, a copy of which is attached to said amended complaint as Exhibit "C"; she particularly denies that said security had or has no market value, as alleged in paragraph III in said amended complaint, and she denies each and every other allegation being and contained in said paragraph III.

## IV.

That defendant denies that the said promissory notes contained a promise to pay a reasonable amount, or any amount, as and by way of attorneys' fees, and she particularly denies that a reasonable attorneys' fee is Five Hundred (\$500.00) Dollars or any other sum whatsoever, as alleged in paragraph IV of said amended complaint.

By way of affirmative defense and further answer to said amended complaint, defendant alleges:

## I.

That at all times mentioned in the amended complaint herein, and in this answer, defendant was, and still is, a resident of the State of California.



## II.

That prior to the 19th day of November, 1920, the defendant and J. R. Moore mentioned in the amended complaint were the owners, or purported owners, in undivided interests, of certain lands located and being in the State of California; that the said J. R. Moore became and was desirous of disposing of and selling to defendant [10] his interest therein, and accordingly on or about the 19th day of November, 1920, the defendant, believing the title thereto was good and valid, purchased from the said J. R. Moore his interest or purported interest in said lands, and thereupon executed and delivered to him, as evidence of the unpaid purchase price thereof, three (3) promissory notes in the sum of Three Thousand (\$3000.00) Dollars, Five Thousand (\$5000.00) Dollars, and Five Thousand (\$5000.00) Dollars, respectively, and a mortgage hereinafter referred to covering other lands in the State of California owned by the defendant as security therefor.

## III.

That at the time of said transaction the said J. R. Moore knew that the title of said lands, and to his interest, or purported interest, therein, was invalid; that he purposely, designedly and fraudulently deceived defendant with reference to his said title, and the invalidity thereof, and fraudulently withheld from defendant the information and knowledge then in his possession concerning the invalidity of such title; that otherwise defendant

would not have purchased the interest, or purported interest, of the said J. R. Moore.

#### IV.

That not until after the payment by defendant of the first of said promissory notes, to wit, the said note for Three Thousand (\$3000.00) Dollars, did defendant discover the fraud practiced upon her by the said J. R. Moore as aforesaid; that otherwise defendant would not have paid said note; that since discovering said fraud the defendant has refused to make payment of the other said two (2) promissory notes in the sum of Five Thousand (\$5000.00) Dollars each, principal and interest.

#### V.

That copies of the said two (2) unpaid promissory notes [11] herein sued upon, and of the said mortgage executed simultaneously therewith as security therefor, are set forth as exhibits "A" and "B" to plaintiff's amended complaint, and are by reference made a part hereof.

#### VI.

That there was no consideration moving from the said J. R. Moore to the defendant for said notes or mortgage, or any or either of them, and the said notes and mortgage, and each and all of them, were wholly without consideration.

#### VII.

That the plaintiff, J. M. Maxwell, never paid value for said promissory notes, or either of them, and neither of the said promissory notes was acquired by the plaintiff in due course, but at all times the plaintiff was acting for and in behalf of, and as the

agent of, the said J. R. Moore, the payee of said notes, and the said J. R. Moore is the actual and beneficial owner of said notes and mortgage.

By way of a second affirmative defense to said amended complaint, defendant alleges:

I.

That at all times in said amended complaint and in this answer mentioned, defendant was, and still is, a resident of the State of California.

II.

That on or about the 19th day of November, 1920, defendant executed and delivered to J. R. Moore two (2) certain promissory notes in the sum of Five Thousand (\$5000.00) Dollars each, and a mortgage covering certain timber lands lying and being in the County [12] of Del Norte, State of California, as security therefor; that copies of said promissory notes and of said mortgage are set forth and attached to plaintiff's amended complaint, and are marked Exhibits "A" "B," and are by reference thereof hereby made a part of this answer.

III.

That at the time of the execution and delivery of said promissory notes and mortgage, the said timber lands described in and covered by said mortgage were, and are, of the reasonable worth and value of to wit, the sum of Twenty Thousand (\$20-000.00) Dollars.

IV.

That the negotiations leading up to said transaction involving the execution and delivery of said promissory notes and mortgage, and the consumma-

tion thereof, occurred and took place in the State of California, and the parties participating therein, namely, the defendant and the said J. R. Moore, were at all of said times in the said State of California.

V.

That Article X, Chapter I, of the California Code of Civil Procedure, relating to actions for the foreclosure of mortgages, provides among other things as follows; to wit:

“Section 726.—Proceedings in Foreclosure Suits. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with this Chapter. In such action the court may, by its judgment, direct the sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney’s fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage.”

That said Chapter and said Section and provisions at all times herein mentioned were, and still are, in full force and effect and set forth [13] the law as it then existed, and now exists, in the State of California relating to actions for the foreclosure of mortgages and for the recovery of debts.

## VI.

That no action at law or in equity has ever been begun on said mortgage, or for the foreclosure thereof, by either the plaintiff or by the said J. R. Moore, or by anyone in their, or either of their behalf, in the State of California, or in any other state or tribunal.

## VII.

That this Court has no jurisdiction of the subject matter of this action.

WHEREFORE, having answered the amended complaint of the plaintiff herein, defendant demands that said cause be dismissed; that she go hence without day, and that she have her costs and disbursements herein incurred.

C. A. RIDDLE,

Attorney for Defendant.

Office and Post Office Address:

Suite 327 Colman Bldg.,

Seattle, Washington. [14]

United States of America,

Western District of Washington,

County of King,—ss.

C. A. Riddle, being first duly sworn on oath, says: That he is the attorney for the defendant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true; that he makes this affidavit and verification for and on behalf of the defendant, and as her attorney of record in said cause, for the reason that she is without the State of



Washington, being a resident of the State of California.

C. A. RIDDLE.

Subscribed and sworn to before me this 25th day of August, 1922.

[Notary Seal] JAMES KIEFER,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Copy of the foregoing answer to amended complaint received and due service admitted, this 25th day of August, 1922.

FLICK & PAUL,  
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 25, 1922. F. M. Harshberger, Clerk. [15]

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In the District Court of the United States in and for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant,

G. W. NINEMIRE,

Garnishee Defendant.

**Reply.**

For reply to the affirmative defenses and further answers to amended complaint submitted by defendant Eva L. Ricks, plaintiff herein admits, denies and alleges as follows:

**I.**

For reply to paragraph I of said first affirmative defense, plaintiff admits the same.

**II.**

For reply to paragraph II of said first affirmative defense plaintiff has not information sufficient to form a basis for belief and therefore denies the same and each and every allegation contained therein.

**III.**

For reply to paragraph III of said first affirmative defense, plaintiff has not information sufficient to form a basis for belief and therefore denies the same and each and every part thereof; and further asserts that in truth and in fact said defendant Eva L. Ricks, with others, has organized a corporation which is selling to the public the lands referred to in paragraph III of said first affirmative defense on the same title and without any correction having been made therein at any time by said Eva L. Ricks [16] and further that said Eva L. Ricks, defendant herein, was the primary owner of the lands mentioned in paragraph III and with full knowledge of the title induced said J. R. Moore to become interested and did interest him in said lands.

## IV.

For reply to paragraph IV of said first affirmative defense plaintiff has not information sufficient to form a basis for belief and therefore denies the same and each and every part thereof, excepting that plaintiff admits the allegations that defendant Eva L. Ricks has refused to pay the notes in said paragraph referred to.

## V.

Admits the allegations contained in paragraph V of said first affirmative defense.

## VI.

For reply to paragraph VI of said first affirmative defense plaintiff has no information sufficient to form a basis for belief and therefore denies the same and each and every part thereof.

## VII.

For reply to paragraph VII of said first affirmative defense specifically denies each and every allegation therein contained.

## VIII.

For reply to paragraph 1 of second affirmative defense plaintiff admits the same.

## IX.

For reply to paragraph II of said second affirmative defense plaintiff admits same.

## X.

For reply to paragraph III of said second affirmative defense plaintiff denies the allegations therein contained.

## XI.

For reply to paragraph IV of said second affirma-



tive defense [17] plaintiff has no information sufficient to form a basis for belief and therefore denies the same and each and every part thereof.

## XII.

For reply to paragraph V of said second affirmative defense plaintiff has no information relating to the allegations therein set forth sufficient to form a basis for belief and therefore denies the same.

## XIII.

That plaintiff admits the allegations contained in paragraph VI of said second affirmative defense but again alleges that the lines mentioned in said second affirmative defense are without value and were without value at the time of the transactions therein recited, and that a quitclaim deed of said property has duly been filed with the Clerk of the Court above-entitled with directions in writing to deliver same to defendant Eva L. Ricks, upon demand.

## XIV.

For reply to paragraph VII of said second affirmative defense plaintiff denies allegations therein contained and asserts that this action is an action on a personal debt of said defendant Eva L. Ricks and not an action in foreclosure.

WHEREFORE plaintiff prays judgment against defendant in accordance with the prayer of the amended complaint now on file in this court.

FLICK & PAUL.

State of Washington,  
County of King,—ss.

J. W. Maxwell, being first duly sworn, on oath says: That he is the plaintiff in the above-entitled action: that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

J. W. MAXWELL.

Subscribed and sworn to before me this 25th day of August, 1922.

[Notary Seal]                      HENRY FLICK,  
Notary Public in and for the State of Washington,  
Residing at Seattle, Wash.

Copy of within reply received and due service of the same acknowledged this 25th day of Aug., 1922.

C. A. RIDDLE,  
Attorney for Deft. [18]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 26, 1922. F. M. Harshberger, Clerk. [19]

In the District Court of the United States, Western  
District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant,

G. W. NINEMIRE,

Garnishee Defendant.

**Decision.**

Filed Jan. 18, 1923.

EDWIN H. FLICK, Esq.,

ALFRED J. SCHWEPPE, Esq.,

For Plaintiff,

SULLIVAN & SULLIVAN,

THEO. J. ROCHE, Esq.,

C. A. RIDDLE, Esq.,

For Defendant.

CUSHMAN, D. J.—The defendant, in California, executed notes secured upon real estate in California, each of which notes recited:

“This note is secured by mortgage of even date.”

Suit is brought in this court upon the notes, by a purchaser before maturity, plaintiff, at the time of purchase, knowing the mortgage was upon land in California. The complaint alleges that the land

mortgaged has no market value and tenders defendant "the instrument describing said security," by which the mortgage is evidently meant. Defendant pleads the following statutes of California:

"Sec. 726. Proceedings in foreclosure suits. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with this Chapter. In such action the court may, by its judgment, direct the sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of [20] the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage."

Defendant alleges the lands mortgaged to be of the reasonable worth and value of \$20,000. No action or suit has ever been begun for the foreclosure of the mortgage. The evidence has shown the land mortgaged to be of considerable value.

By plaintiff, it is contended that the foregoing statute relates solely to the remedy and doesn't inhere in the contract and, therefore, a suit may be maintained in Washington on the notes, alone. Defendant contends that, the notes and mortgage having been executed in California and the land mort-

gaged being in California, the right under the statute to have the mortgaged realty devoted to the satisfaction of the notes before defendant is harassed further inheres in the contract and that plaintiff cannot waive it, and that, for that reason, the suits should be dismissed.

The Court deems defendant's contention to be the law applicable to the situation. While the statute, in form, relates to the remedy, yet it gives defendant a right to have the mortgaged property exhausted before she is forced to pay anything further, and, the contract having been made in view of the statute, the latter forms a part thereof. Any public policy favoring the unimpaired negotiability of such instruments is outweighed by the consideration that the state of a man's residence should not be made for him a house of refuge. The refusal of the courts of other jurisdictions to give a liberal construction to laws enacted by such a state to protect its resident contract debtors, it is perfectly clear, would not more [21] closely knit the bonds of union. If plaintiff secured judgment in this suit, under the full faith and credit clause of the Constitution, he could sue upon his judgment in California and resort to any property of the defendant, not exempt, for its satisfaction, thereby easily defeating the purpose of the law.

The following cases, which have been called to the Court's attention, are not controlling for reasons which may be briefly stated:

London & San Francisco Bank vs. Dexter Horton Co., 126 Fed. 593 (9th C. C. A.).

The land mortgaged was situated in Washington. The California statute was held not to apply.

*Dolbear vs. Foreign Mines Devel. Co.*, 196 Fed. 646 (9th C. C. A.).

The defense was not one made by the mortgagor, a corporation, but was sought to be invoked by a stockholder, sued upon his liability as stockholders of the corporation for its debts.

*Mantle vs. Dabney*, 47 Wash. 394.

The note was given in Montana. The land mortgaged was in California. The Court held a similar statute of Montana would not defeat plaintiff's action upon the note in a Washington court.

*Felton vs. West*, 36 Pac. 676, 102 Cal. 266.

The land mortgaged was in Oregon. The statute was held to apply only to actions to recover debts secured by mortgage upon land in California.

*Denver Stockyards Bank vs. Martin*, 170 Pac. 428, 177 Cal. 223.

The note was given in Colorado and was secured by a mortgage in Colorado. Suit was brought in California.

*Martin vs. Becker*, 146 Pac. 625, 169 Cal. 30.

The statute was held to be for the benefit of the primary debtor and held not to defeat the foreclosure of a mechanic's lien also [22] securing the mortgage.

*Savings Bank vs. Central Market*, 54 Pac. 273, 22 Cal. 24.

The plaintiff was the holder of a second mortgage upon property which had been exhausted upon the foreclosure of the first mortgage.



The following decisions of the California Supreme Court support the defense and are binding upon this court.

Barbieri vs. Remelli, 84 Cal. 154, 23 Pac. 1086,

In the foregoing case the defense was held good, even though the property mortgaged proved valueless.

Meyer vs. Weber, 65 Pac. 1110, 133 Cal. 681, 685;

Bartlett vs. Cottle, 63 Cal. 366;

Ould vs. Stoddard, 54 Cal. 615;

Gnarini vs. Swiss American Bank, 121 Pac. 726, 162 Cal. 181;

See, also,

27 Cyc. 1274-J, 2; 1275, and 1276.

On account of the conclusion reached, the other questions involved need not be considered.

Findings and judgment for defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

G. W. NINEMIRE,

Garnishee Defendant.

### **Judgment.**

The above-entitled cause having come on duly and regularly for trial on the 20th day of December, 1922, the trial having been begun and having proceeded on said date and having been continued over and completed on the 21st day of December, 1922, the plaintiff being present in court and being represented by Edwin H. Flick and Alfred Schweppe, his attorneys, and the defendant appearing in person and being represented by C. A. Riddle, her attorney, and a jury having been waived by written stipulation entered in said cause, and witnesses having been sworn and examined on behalf of the plaintiff and of the defendant, and a presentation of said cause thereafter having been made and argued by the respective counsel for said plaintiff and said defendant, and the Court having taken said cause under advisement, and having on the 18th day of January, 1923, found for Eva L. Ricks, the de-



fendant upon the ground that there can be no recovery upon the notes sued upon because said notes were executed in the State of California and were secured by a mortgage on lands in California, of which the plaintiff had knowledge, and by the laws of California suit of foreclosure must first be brought in that state and the mortgage security exhausted before the initiation [24] of any other suit or proceeding; and the Court being fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED, CONSIDERED AND ADJUDGED, that said cause be, and the same is hereby, dismissed, and that the defendant do have and recover her costs and disbursements against J. W. Maxwell, plaintiff in said action, to be taxed.

Done in open court this 8th day of February, 1923.

EDWARD E. CUSHMAN,  
Judge.

Approved:

CARROLL B. GRAVES.

EDWIN H. FLICK.

Exceptions allowed.

EDWARD E. CUSHMAN,  
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 8, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

**Petition for Writ of Error.**

To the Honorable Judge of the above-entitled  
Court:

The above-named plaintiff feeling aggrieved by the judgment rendered and entered in the above-entitled cause and court on the 8th day of February, 1923, hereby petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States, for the Ninth Circuit, at the City of San Francisco, California, for the reasons set forth in the assignment of errors filed herewith, and he prays that a writ of error be allowed in this behalf, that citation issue as provided by law and that an order be made fixing the amount of security to be given by plaintiff, and upon giving such bond as may be required, that such further proceedings be had as provided by law and by the rules of the said Circuit Court of Appeals.

CARROLL B. GRAVES,

Attorney for Plaintiff and Petitioner.

Writ of error granted and allowed upon bond being given as required by law for the sum of \$300.00.

Dated this 1st day of August, 1923.

JEREMIAH NETERER,

Judge. [26]

Acceptance of service of within petition for writ of error acknowledged this 1st day of August, 1923.

C. A. RIDDLE,

Attorney for Deft.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 1, 1923. F. M. Harshberger, Clerk. [27]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

**Assignments of Error.**

Now comes J. W. Maxwell, plaintiff in the above-entitled cause and court, and as plaintiff in error, and in connection with his petition for a writ of error in this cause, assigns the following errors occurring upon the trial of said cause, and upon which he relies to reverse the judgment entered herein:

1. The Court erred in finding and adjudging that plaintiff could not recover in the above-entitled cause and court upon the notes in suit because said notes were executed in the State of California and secured by a mortgage on lands in said state, and that by the laws of California foreclosure suit must be brought first in that state and the mortgage securities exhausted before the commencement of any other suit or proceeding.

2. The Court erred in holding and deciding that no recovery could be had upon the notes in suit in the above-entitled court because mortgage foreclosure had not been brought in the State of California and the mortgage securities for said notes had not first been exhausted in a foreclosure suit and sale.

3. The Court erred in holding and deciding that, by the laws of the State of California, an action upon the notes in suit could not be maintained in the above-entitled court unless and [28] until the mortgage security had first been exhausted by foreclosure and sale in the State of California and under the laws thereof.

4. The Court erred in holding and deciding that the above-entitled court had no jurisdiction to enter judgment upon the notes in suit, and in dismissing the action and entering judgment against the plaintiff because of said alleged want of jurisdiction.

CARROLL B. GRAVES,

Attorney for Plaintiff and Plaintiff in Error.

Acceptance of service of within assignments of error acknowledged this 1st day of August, 1923.

C. A. RIDDLE,

Attorney for Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 1, 1923. F. M. Harshberger, Clerk. [29]

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
That J. W. Maxwell, plaintiff in the above-entitled cause of action, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Eva L. Ricks, defendant in the above-entitled cause, in the sum of Three Hundred (\$300.00) Dollars, to be paid to the said Eva L. Ricks, her heirs, executors and administrators, for the payment of which, well and truly to be made, the said principal and said surety bind themselves and each of them, and each of their heirs, executors,

administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of August, 1923.

WHEREAS, the principal herein, being the plaintiff in the above-entitled cause of action, has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, to reverse the judgment in the above-entitled court and cause, rendered and entered in favor of the defendant therein and against the plaintiff therein;

NOW, THEREFORE, The condition of this obligation is such, that if the above-bounden principal shall prosecute said writ [30] of error and answer all damages and costs, if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

J. W. MAXWELL,  
Principal.

By Carroll B. Graves,  
His Attorney.

FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND,

Surety.

[Corporate Seal]

By A. W. Whalley,  
Atty. in Fact.



The within bond is approved as to sufficiency and form, this 1st day of August, A. D. 1923.

JEREMIAH NETERER,  
District Judge.

Acceptance of service of within bond on writ of error acknowledged this 1st day of August, 1923.

C. A. RIDDLE,  
Attorney for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 1, 1923. F. M. Harshberger, Clerk. [31]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

**Praeipie for Transcript of Record.**

To the Clerk of the Above-entitled Court:

Please prepare a transcript of record for use in your return to the writ of error herein, which transcript shall include the following:

1. Amended complaint.
2. Answer to amended complaint.
3. Reply.

4. Final judgment.
5. Opinion of the Court.
6. Petition for writ of error and the order allowing said writ and fixing bond.
7. Assignments of error.
8. Bond on writ of error and approval.
9. Citation.
10. Writ of error.
11. This praecipe.
12. Original citation and writ of error.
13. Clerk's certificate.

Dated this 11th day of August, 1923.

CARROLL B. GRAVES,

Attorney for Plaintiff and Plaintiff in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 11, 1923. F. M. Harshberger, Clerk. [32]

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In the United States District Court for the Western District of Washington, Northern Division.

No. 6662.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.



**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 32, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.), for making record, certificate or return, 77  
folios at 15¢ ..... \$11.55

Certificate of clerk to transcript of record, 4 folios at 15¢ .....	.60
Seal to said certificate .....	.20

I hereby certify that the above cost for preparing and certifying record, amounting to \$12.35, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 27th day of August, 1923.

[Seal]

F. M. HARSHBERGER,  
Clerk United States District Court, Western District of Washington.

By Frank L. Crosby, Jr.,  
Deputy Clerk. [34]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. —.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America  
to the Judges of the District Court of the  
United States for the Western District of  
Washington, Northern Division, GREETING:

Because of the record and proceedings, as also  
in the rendition of the judgment of the plea which  
is in the said District Court before you, or some of  
you, between J. W. Maxwell, plaintiff, and Eva L.  
Ricks, defendant, a manifest error hath happened,  
to the great damage of the said J. W. Maxwell, as  
is said and appears by the complaint, we being will-  
ing that such error, if any hath been, should be duly  
corrected and full and speedy justice done to the  
party aforesaid, in this behalf, do command you,  
if any judgment be therein given, that then, under  
your seal, distinctly and openly, you send the record  
and proceedings aforesaid, with all things concern-  
ing the same, to the United States Circuit Court  
of Appeals for the Ninth Circuit, at the court-  
rooms of said court in the city of San Francisco,  
in the State of California, together with this writ,  
so that you have the same at the said place before  
the Justice aforesaid, within thirty days from the  
1st day of August, 1923, that the record and pro-  
ceedings aforesaid being inspected, the said United  
States Court of Appeals may cause further to be  
done herein to correct that error, what of right  
and according to [35] the law and custom of  
the United States ought to be done.

WITNESS, the Honorable WM. H. TAFT, Chief Justice of the Supreme Court of the United States, this 1st day of August, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal] F. M. HARSHBERGER,  
Clerk of Said District Court of the United States,  
for the Western District of Washington. [36]

Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 1, 1923. F. M. Harshberger, Clerk. By \_\_\_\_\_, Deputy.

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. —.

J. W. MAXWELL,

Plaintiff,

vs.

EVA L. RICKS,

Defendant.

**Citation.**

United States of America,—ss.

To Eva L. Ricks, defendant in the above-entitled action, GREETING:

You are hereby cited and admonished to be and appear in United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to a

writ of error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein the plaintiff in the above-entitled cause is the plaintiff in error, and you, as defendant in said cause, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, United States District Judge for the District of Western Washington, this 1st day of August, 1923.

JEREMIAH NETERER,

Judge.

Service of foregoing citation and receipt of a copy thereof acknowledged this 1st day of August, 1923.

C. A. RIDDLE,

Attorney for Eva L. Ricks, Defendant and Defendant in Error. [37]

Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 1, 1923. F. M. Harshberger, Clerk. By \_\_\_\_\_, Deputy.

[Endorsed]: No. 4088. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Maxwell, Plaintiff in Error, vs. Eva L. Ricks, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed August 29, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.